CHARLES A. BEATTY AND JOHN T. RITCHIE, APPELLANTS *vs.* DANIEL KURTZ AND OTHERS, TRUSTEES OF THE GERMAN LUTHERAN CHURCH OF GEORGETOWN, APPELLEES.

A lot of ground had, in the original plan of an addition to Georgetown, been marked "for the Lutheran church," and by the German Lutherans of the place, had been used as a place of burial from the dedication, and who had erected a school house on it, but no church; exercising acts of protection and ownership over it at some periods, by committees appointed by the German Lutherans; the original owner acquiescing in the same. This may be considered as a dedication of the lot to public and pious uses: and, although the German Lutherans were not incorporated, nor were there any persons who as trustees could hold the property, the appropriation was also valid under the bill of rights of Maryland. The bill of rights, to this extent at least, recognizes the doctrines of the statute of Elizabeth for charitable uses; under which it is well known, that such uses would be upheld, although there was no specific grantee or trustee. This might at all times have been enforced as a charitable and pious use, through the intervention of the government, as *parens patriæ*, by its attorney general or other law officer. It was originally consecrated for a religious purpose. It has become a depository of the dead; and it cannot now be resumed by the heirs of the donor. [584]

If the complainants in the circuit court were proved to be the regularly appointed committee of a voluntary society of Lutherans in actual possession of the premises, and acting by their direction to prevent a disturbance of that possession; under the circumstances of this case, there does not appear to be a serious objection to their right to maintain a suit for a perpetual injunction against the heirs of the donor, who sought to regain the property, and to disturb their possession. [584]

The only difficulty which presents itself upon the question, whether the complainants in the circuit court have shown, in themselves, sufficient authority to maintain their suit, is, that it is not evidenced by any formal vote or writing. If it were necessary to decide the case on this point, under all the circumstances, it might be fairly presumed. But this is not necessary; because this is one of those cases in which certain persons belonging to a voluntary society, and having a common interest, may sue in behalf of themselves and others, having the like interests, as part of the same society, for purposes common to all, and beneficial to all. [585]

APPEAL from the circuit court of the county of Washington.

The appellees filed their bill in the circuit court against Charles A. Beatty and John T. Ritchie, which states, in substance, that the late colonel Charles Beatty and George Frazier Hawkins, in the year 1769, laid out on lands belong-

ing to them, and adjoining the town of Georgetown, a certain town known by the name of "Beatty and Hawkins's addition to Georgetown;" the lots whereof were laid down and distinguished on a plot, and disposed of by lottery. That Beatty in laying out the said addition, distinguished and set apart a certain lot or portion of ground in the said addition, for the sole use and benefit of the German Lutheran church; declaring the same to be their absolute right and property, to be held by them for religious purposes, and the use of said congregation, and caused the same to be so entered and designated in the plot of said addition, as now appears by the plot and papers on record in the clerk's office for Washington, to which they beg leave to refer: which plot and papers were recorded under authority of the act of Maryland 1796, ch. 54; which lot is described in the said plot of said addition, as the German Lutheran church lot, and also in the general plot of the town of Georgetown and its additions, deposited in the office of the clerk of the corporation of Georgetown. That soon after the lots in the said addition were laid off and disposed of as aforesaid, the said lot was taken possession of by the said German Lutherans, and was enclosed, and a church erected thereon; and hath been kept and held by them ever since, during a period, as they believe, of upwards of fifty years, and hath been used by them as a burying-ground for the members of the said church, with the avowed intention of building thereon another church or place of worship, the building first erected being decayed, whenever their funds would enable them to do so. That during all this period, neither their possession nor title hath ever been questioned, and the lot has been exempted from taxation at their request, by the corporation of Georgetown, as being church property. That Charles Beatty died about sixteen years ago, and without having made any conveyance of the said lot, and that Charles A. Beatty is his heir at law. They therefore pray that he may be made defendant, and be compelled to convey the title to the complainants, in trust for the German Lutheran church.

They further state that the defendant John T. Ritchie, without any pretence of title, disputes the title of complain-

ants and their right of possession, and has undertaken to enter on part of the lot, and to remove tomb stones, &c. and they fear that he means to dispossess them: wherefore they pray subpœna, &c. and that they may be quieted in their possession of said lot, and that the defendant, Ritchie, may be enjoined from disturbing their possession; and for general relief.

The answer of the defendants in the court below, admits that Charles Beatty deceased, did designate a lot in his addition to Georgetown, by inscribing on the plot thereof these words, "for the Lutheran church;" that they always understood and believed that he meant by that inscription to manifest an intention to appropriate that lot to the use of the Lutherans, provided they would build on it, within a reasonable time, a house of public worship, which would conduce to diffuse piety, to enhance the value of his property, and to adorn his addition to Georgetown. But they deny that this inscription was ever meant, or could be interpreted to be a contract with the Lutheran church, to convey to that body the property in question. That the writing itself could not operate as a conveyance, and there was no consideration to sustain it as a contract. They deny that Charles Beatty ever declared the lot in question to be the absolute right and property of the Lutherans; or did, in any manner, by means thereof, hold out inducements to them or the public to purchase tickets in the pretended lottery mentioned in the bill, or to purchase and improve lots in that part of the town. They aver that no church had ever been built on it, and that its occupation by graves and a school house, was a use of it by no means beneficial to defendants, or him under whom they claimed.

The answer denies the possession averred in the bill; and also that there ever was an organized congregation of German Lutherans in Georgetown.

It avers also, that the lot in question has remained unenclosed for at least three fourths of the time since it became a part of Georgetown; and that the enclosures which occasionally surrounded it, were not erected by the complainants nor those whom they pretend to represent. The re-

spondents admit that the lot was used as a burying ground; but aver that it was thus used by Beatty's permission, and not exclusively by the Lutherans, but the public generally. But they further say, that if the Lutherans had enjoyed the possession alleged in the complainants' bill, they might and should have enforced the rights thereby acquired at law, and ought not to have come into equity for a remedy. Finally, confessing that they had resumed possession of the property, they deny the authority of the complainants to act in behalf of the pretended German Lutheran church, and pray the same benefit of these defences as if they had been urged by plea to the bill.

The plaintiffs amended their bill, by stating, the German Lutheran church, mentioned in their bill, was composed of the members of the German Lutheran church in Georgetown, duly organized as such; "that the lot was set apart by C. Beatty," from and out of that "part of the said land, composing said addition," of which he, the said Beatty, was seised. "The said Beatty, by the said designation, declaration, and setting apart, holding out to the public, and to the German Lutherans particularly, inducements as well to purchase tickets in a lottery, by which the said lots were disposed of, as to purchase and improve that part of the town in other ways. And thereby meaning to transfer to the said German Lutherans, as soon as they should organize themselves into a congregation or church, all his right to said lot in fee, to be used for the religious purpose of such congregation or church, and thereby declaring that intention. That they organized themselves into a congregation or church, and erected a church, or house of worship on the said lot." That the complainants, and the congregation for whom they act, have called upon C. A. Beatty, and required a conveyance according to the promise and declared intent of the said Charles Beatty, deceased: that upon organizing the church or congregation aforesaid, certain officers, called a committee, were appointed to take charge of the concerns of the church; which appointments were, from time to time, made and renewed, and that complainants were appointed in 1824, and have continued to hold such appointment ever since.

To those amendments, the defendants answered, and denied all the allegations in the amended bill.

It was in evidence, that soon after this lot was thus set apart for the Lutherans, it was, with Colonel Beatty's permission, taken possession of by certain persons of that sect in Georgetown, who had a log house erected on it, which was called a church, and used as such frequently, and also as a school house by the German Lutherans. That in the year 1796, a German minister came from Philadelphia and was employed by them, and preached in this house for three months, being employed and paid by the German Lutherans of Georgetown; and about the year 1799, the congregation of German Lutherans, of which Travers, the witness in this cause, was one, employed a German minister, who officiated in said house for about nine months. Though divine service was frequently administered in that building, there was, at no other periods than those just mentioned, a stationed preacher who ministered to a congregation in regular attendance there, except a Mr Brooke, who was an Episcopal clergyman, and who, Dr Balch testifies, had possession of that building as a church in 1779. In the same, or the following year, a steeple was erected on the said house, in which a bell was hung, at the expense and by the direction of the German Lutherans of Georgetown. This building some years afterwards went to decay, and no church has been since rebuilt on the lot; though efforts have been since made for that purpose, and as late as 1823 a considerable subscription was raised, but not sufficient for the object.

During the whole period from 1769 to the bringing of this suit, the lot in question was generally under enclosures, put up at the expense of the Lutherans of Georgetown, and under the care and custody of a committee appointed by them. It has been continually so enclosed for more than twenty years, before the entry and claim set up by the defendants in this suit. The said lot has been also used by the Germans as a burying ground from the year 1769 till a short time before the bringing this suit, and has been called and known as the Dutch burying ground; and one of the witnesses, Styles, acted as sexton, under the orders of the committee of the

congregation. It does not appear that the German Lutherans in Georgetown, ever were incorporated by law as a religious society.

It also appeared from the evidence, that from the year 1769, till within a month or two before the bringing this suit, no claim to the possession or property in the lot now in dispute, was ever set up by Col. Charles Beatty, or by either of the defendants; but on the contrary, Col. Charles Beatty, up to the time of his death, always declared it to be the property of the German Lutherans of Georgetown; his administrator, Abner Ritchie, who, it is stated, sold all his lots in said addition left by him at his death, never claimed or offered to sell the lot in question, as part of his property; that his son and heir the defendant, Charles A. Beatty, has repeated the same declarations to a witness, (Mountz) a few years before this suit—he expressed "his surprise, that the Germans had been so indifferent about getting their title to this property, as he was always ready and willing to give them a deed for it."

A witness, Mr Rhæffer, testified that in 1823, the defendant Beatty, in his presence, declared, "that the lot aforesaid was the property of the Lutherans, and that he was very anxious to make them a deed. He also confirmed the evidence of the other witnesses.

It also appeared from the evidence, that since the year 1769, the said lot has never been assessed for taxes to Col. Beatty or his heirs, nor have any taxes ever been paid by them. That it has always been recognized by the corporation of Georgetown, since their charter in 1789, as the church property of the Lutherans; and as such, has been exempted from taxation, with other church property in the town.

It was in evidence, that the Lutherans of Georgetown always had a church committee to act for them, and to take charge and custody of the lot in question; and the appellees constituted that committee from 1816, till the bringing this suit, and to the present time. In virtue of that appointment, when Ritchie entered on the premises, and threw down the fence and tombstones, they filed this bill for a conveyance

in fee of the lot, to complainants as trustees for said church; to be quieted in the possession thereof; and for an injunction to restrain the appellants from disturbing their possession, or trespassing on said lot.

The circuit court decreed a perpetual injunction against the defendants, the appellants; who, by their appeal, brought the case before this Court.

The cause was argued for the appellants, by Mr C. C. Lee; and for the appellees, by Messrs Key and Dunlop.

For the appellants it was claimed that the decree of the court below should be reversed, and the bill dismissed.

1. Because neither C. Beatty nor his son, ever did any act which divested either of them of the right of property and possession in the lot in question.

2. Because neither of them ever entered into any contract, (and least of all such an one as a court of equity will enforce), with the appellees, or those whom they pretend to represent, to convey to them or their pretended *cestui que trusts* the lot in question.

3. Because the appellees, or those whom they pretend to represent, have never had such an adverse possession of the lot as gave them a title to it.

4. Because, if they had, it was such a title as they might and should have enforced at law and not in equity.

5. Because the appellees have failed to show any authority in themselves to prosecute this suit.

Mr Lee contended that the only act done by C. Beatty or his heirs, which can be pretended to have divested them of the title to the lot in question, is the inscription by C. Beatty on the plot of the lot, of the words "for the Lutheran church." No possible interpretation of these can make them act as a conveyance; and the bill itself, which attempts to interpret them into a contract, and which seeks to have that contract specifically performed, necessarily admits the title of the lot to be still remaining in the appellants.

Dismissing then this point, as scarcely made in the case, it will be most perspicuously treated by considering the bill in reference to its different prayers, which are for specific

performance, and to be quieted in possession. This leads directly to the point that the bill shows no contract of which equity will decree performance. The words relied on as creating a contract are the aforesaid inscription, "for the Lutheran church." But of the three requisites of a contract, two are wanting here, viz. parties and a price; and interpret them as you will, no mutuality can be pretended. This of itself is sufficient to prevent the assistance of a court of equity. Howel *vs.* George, 1 *Mad.* 12. Moreover, the contract alleged concerns lands, and must therefore, by the statute of frauds, be in writing. But there is no consideration mentioned in the contract as set out; and this has been too often decided to be an essential part of a contract, and therefore to be embraced in the written instrument, to need illustration from cited authorities. True, the plot of Beatty & Hawkins's addition to Georgetown, with the said inscription thereon, was recorded, as alleged in the bill, by the act of 1796, ch. 54; but the Court will perceive by inspecting that act, that it does not affect this discussion.

The appellees will doubtless insist on a part performance of the pretended contract, to relieve themselves from operation of the statute of frauds. This is a matter of fact, which the Court must decide on from the evidence. They will at least remember, that if the appellees rely on their pretended erection of a pretended church, as an execution on their part of the pretended contract, they admit that they were bound by that contract to erect a church; while it will be impossible to regard a log school house, afterwards converted into a dwelling house, and now destroyed, whoever may have called it a church and have preached in it, as such a building to be applied to such a purpose as is called for by a contract to build a church. And it may also be observed upon this part of the case, that this prayer of the bill was refused by the court below, and no appeal was taken from that decision.

As to the second prayer of the bill, he argued that it might be viewed under two aspects. 1. As regarding the complainants below, dispossessed by the defendants, and seeking to be repossessed and quieted; and 2. As regarding the

complainants in possession, and seeking protection against the defendants as intruders or trespassers. Either view of the case is equally fatal to the bill; and for the same reason, because the proper remedy is at law. For, regarded under the first aspect, the bill is what is reproachfully termed an *ejectment* bill, and clearly condemned. *Cooper's Plead.* 125; Locker *vs.* Rolle, 3 *Ves. Jun.* 4, and Ryves *vs.* Ryves, 3 *Ves. Jun.* 343. And regarded under the second aspect, no precedent can be found to authorise it. The only species of bills which can be mistaken, as affording such a precedent, are bills of peace, and bills founded on the *solet*. But the least reflection will show, that this is not a case for a bill of peace; which is "made use of where a person has a right which may be controverted by various persons at different times, and by different actions," and "where there have been repeated attempts to litigate the same question by ejectment, and repeated and satisfactory trials." 1 *Mad. Ch.* 166. In short, bills of peace lie to prevent multiplicity of actions; and this is not pretended to be brought for that purpose.

Bills founded on the solet are used "where a man is entitled to a rent out of lands, as chief rents or quit rents, and from length of time the remedy at law is lost, or become very difficult;" relief has, in such case, been given in equity, on the sole ground of long and undisputed payment of the rent. 1 *Mad. Ch.* 29. But the appellees in this case, or those whom they pretend to represent, never had such an adverse possession of the lot in question as gave them a title to it; and if they had, the argument supposes them in possession, and they can maintain all their rights at law without the aid of the court of equity.

He also contended, that whatever rights any society of German Lutherans might have to the lot, the appellees had shown no authority in them to prosecute their claim to those rights; and that the bill they had filed, regarded in its true light, is a bill to establish a legal title and to obtain a perpetual injunction. That such a bill is

inadmissible, is clearly established by Wilby *vs.* The Duke of Rutland, 2 *Brown's P. C.* 41.

Mr Lee, in reply to the argument of the counsel for the appellees, said, the true sources of the success of the appellees in the court below were in the clamour about the pollution of the remains of the dead,—in the declamation about violating the sanctuary of the tomb; which triumphed before the inferior tribunal; and which now places the appellants, literally, in the situation which was but figuratively ascribed to Sextius—

> Jam te premet nox, fabulæque manes,
> Et domus exilis Plutonia.—*Hor.*

And after all, the only thing done was by one of the appellants, who threw down a part of the enclosure of the lot in dispute; but it was that part which separated it from his own garden. Yet that is complained of as such a nuisance, as that the chancellor will prevent it by injunction! But while this is complained of as a nuisance, why is not that considered to which the appellants are subjected? It may well be that one will consent to have a grave yard in his vicinity, if it be hallowed by a church. The spire which points us to the skies, may reconcile us to the mound which tells of what is mouldering in the earth. But we object to the bane without the antidote,—the objects which awaken the mortal shudderings, without that which inspires the immortal hopes.

He contended that the old acts of Maryland referred to, were entirely inapplicable to this cause. That the case cited from 7 *John. Ch. Rep.* does not refer to *perpetual* injunctions; and that in the one cited from the 4th vol. of the same book, there was a dispute about boundaries, to ascertain and establish which has long formed a head of chancery jurisdiction; and that the extraordinary powers of one of the parties entitled the other to the extraordinary aid of the chancellor.

As to the possession contended for, Mr Lee insisted, that no persons were pointed out who held that possession; that the temporary committees were never incorporated, and there could have been no holding by succession; and that the appellees, so far from showing any authority vested in them to institute these proceedings, had even failed to show

any congregation or religious society which could confer such an authority.

For the appellees it was contended:

The decree below, for a perpetual injunction, was right, if the appellees had title, either under the *grant* or by *possession*, and we contend that they had title under both.

1. Under the grant, three objections are made to it: that it is without consideration; that there is no certain grantee; that it is within the statute of frauds.

As to consideration, we admit the general rule to be, that equity will not lend its aid to enforce a mere voluntary agreement. But here there is a consideration. The diffusion of piety and promotion of religion are sufficient to support it. Besides there was a money consideration. The designation of this lot as a church lot, caused the tickets to sell, and enabled the grantor to dispose of his property. It is in proof, that the Germans were by this means induced to buy.

"*That there is no certain grantee.*" It is agreed that upon general principles, this grant could not be executed in favour of a voluntary, *unincorporated society*, and that the statute of 43 *Eliz.* ch. 4, having been decided not to be in force in Maryland, no aid can be derived from that statute.

But this grant has had a *legislative recognition;* act of assembly of Maryland, 1796, ch. 54, sections 3 and 4. That act is as strong a recognition of the grant by the Maryland legislature, as if they had passed a *special law* with the *assent* of Beatty, declaring the lot in question to be the property of "*the German Lutherans of Georgetown.*"

If such a special law had passed, would not the *courts* be bound to give effect to the intent of the legislature and donor. Would they not apply to it the principles of construction adopted by England, in relation to the 43 *Eliz.* and the charities provided for by that statute. See 4 *Wheaton*, appendix, p. 11.

It is also contended, that *this grant* is protected and made valid by *the 34th article of the bill of rights of Maryland.* The grant is within the *exception* contained in the 34th article, and that *exception* ought to have a liberal construction.

Within the narrow limits prescribed by the exception, the principles of construction, adopted in England as to the 43 *Eliz.*, ought to be applied. Within these limits it was, and had been, the *policy* of the people and legislature of Maryland, to *favour* the *church*. Acts of assembly of Maryland, 1704, ch. 38; 1722, ch. 4.

The last objection urged against the grant is, that it concerns lands, is not in writing, and is avoided by the statute of frauds. We answer, that the contract is in writing. The inscription on the plot is by Beatty himself, and describes the lot with *certainty*. But if it was not in writing, the contract has been *performed*, the gift *executed*, and possession delivered and retained, for more than fifty years.

If the grant was void for uncertainty of the *donee*, then it is contended, that the appellees, and those under whom they claim, have a good title by possession. The lot has been in their *adversary* possession, by actual enclosures, for more than twenty years.

Having title either under the *grant* or by possession, the only remaining question is, is there a right to the interference of a court of equity, to restrain Ritchie, *the trespasser*, by injunction.

It is said the only remedy is at law, for damages; that a court of equity has no jurisdiction to enjoin trespass. It is known that in ordinary cases of private trespass, the proper remedy is at law, for damages; and this has been found sufficient for the protection of property. But in cases of trespass, of a *peculiar nature*, where the mischief is *irremediable*, which damages could not compensate; where the injury reaches to the very *substance and value* of the estate, and goes to the *destruction* of it in the *character in which it is enjoyed;* the English court of chancery, and the courts of chancery of this country, are in the habit of granting injunctions.

To this point, and in support of the distinction here taken, cited the case of Jerome *vs.* Ross, 7 *Johns. Cha. Rep.* 332; also 6 *Vesey*, 147. 7 *Vesey*, 307. 1 *Brown*, 588. 10 *Vesey*, 290. 17 *Vesey*, 128. 18 *Vesey*, 184.

If any case could justify the strong and menacing hand of

an injunction, *this is it.* What damages can redress the feelings of the injured, or punish, as they ought, the aggressor. What trespass could more effectually *destroy* the property in *the character* in which it is enjoyed.

If the appellees had no other title but possession, the case of Varick *vs.* The Mayor, &c. of New York, 4 *Johnson's Ch. Rep.* 53, fully sustains the decree of the court below. In that case Varick, who applied for and got the injunction, set up *no other title* but *possession* for twenty-five years.

Chancellor Kent says, "after such a length of time, it is right and just that the plaintiff should be protected in his property, &c. The defendant must first acquire possession of the ground in dispute, not by forcible entry, but by regular process of law. The principle upon which the injunction is to be upheld is, that after a claim of right, accompanied with actual and constant possession for twenty-five years and upwards, the corporation of New York cannot be permitted, without due process of law, to enter upon possession, pull down buildings," &c.

In the case at bar, our adversary possession is long enough to take away the appellants' right of entry.

Mr Justice Story delivered the opinion of the Court.

This is an appeal in a suit in equity from a decree of the circuit court of the district of Columbia, sitting for the county of Washington.

Georgetown was erected into a town by an act of the legislature of Maryland, passed in 1751, ch. 25. By subsequent acts additions were made to the territorial limits of the town; and the town was created a corporation, with the usual municipal officers, by an act of the Maryland legislature, passed in 1789, ch. 23. The charter of incorporation has been subsequently amended by congress, by various acts passed upon the subject since the cession.

In the year 1769, Charles Beatty and George F. Hawkins laid out a town, known by the name of Beatty and Hawkins's addition to Georgetown; and which is now included within its corporate limits. The lots of this addition were disposed

of by way of lottery, under the direction of commissioners appointed to lay out the same, and conduct the drawing of the lottery. The books of the lottery and the plan of the lots, and a connected survey thereof, were afterwards, by act passed in 1796, ch. 54, ordered to be recorded in the clerk's office for the territory of Columbia, and copies thereof to be good evidence in all courts of law and equity in the state. Upon the original plan so recorded, one lot was marked out and inscribed with these words, "for the Lutheran church;" and this lot was in fact part of the land of which Charles Beatty was seised.

The bill was brought up by the original plaintiffs, alleging themselves to be trustees and and agents for the German Lutheran church composed of the members of the German Lutheran church of Georgetown, duly organized as such, *in behalf of themselves and the members of the said church.* It charges the laying out of the lot in question for the sole use and benefit of the Lutheran church, to be held by them for religious purposes and the use of the congregation, as above-mentioned. That soon afterwards the lot was taken possession of by the said German Lutherans in Georgetown; who organized themselves into a church or congregation, and erected a church or house of worship thereon; and the lot was enclosed by them and a church erected thereon; and hath been kept and held by them during a period of fifty years; and hath been used as a burying ground for the members of the church, with the avowed intention of building thereon another church or place of worship, the first building erected thereon being decayed, whenever their funds would enable them so to do. That during all this period their possession has never been questioned, and the lot has been exempted from taxation as property set apart for a religious purpose. It further charges that upon the organization of the church or congregation, certain officers, called a committee and trustees, were appointed to take care of the said church, which appointments have been from time to time renewed; that in 1824 the plaintiffs were re-appointed as such, having been so appointed at former times. It further charges that Charles Beatty died about sixteen years ago,

without having made any conveyance of the said lot; and that Charles A. Beatty, the defendant, is his heir, and has the title by descent; and prays that he may be compelled to convey it to them. It further charges that Ritchie, the other defendant, has unwarrantably disputed their title; and has entered upon the lot and removed some of the tomb stones erected thereon, and means to dispossess the plaintiffs and to remove the tomb stones and graves. The bill therefore prays that they may be quieted in their possession, and that a writ of injunction may issue, and for further relief.

The defendants put in a joint answer. They admitted that the lot was so marked in the plot as the bill states, and that it was Charles Beatty's intention to appropriate the same to the use of the Lutheran congregation, provided they would build thereon, within a reasonable time, a house of public worship. They deny that the German Lutherans were ever organized, as stated in the bill; or that any such church has been built; or that there has been any such possession or enclosure as the bill asserts; or that Charles Beatty ever made any conveyance of the property to transfer his title. They admit that the lot has been used as a grave yard, but not exclusively appropriated to the use of the Lutheran congregation. They admit that a building was erected thereon, but that it was used as a school house. They admit that the defendant, Beatty, is heir at law, and as such, that he claims the lot in question, and has authorized the defendant, Ritchie, to take possession thereof. They deny all the equity in the bill, as well as the authority of the plaintiffs to sue; declaring them to be mere volunteers, and demanding proof of their authority, &c.

The general replication was filed, and the cause came on for a hearing upon the bill, answer, exhibits and depositions; and the court decreed a perpetual injunction against the defendants, with costs. The appeal is brought from that decree.

Upon examining the evidence, it appears to us that the material allegations of the bill are satisfactorily established. It is proved that, shortly after the appropriation, and more

than fifty years ago, the Lutherans of Georgetown proceeded to erect a log house on the lot, which was used as a church for public worship, by that denomination of Christians; and was also occasionally, and at different times since, used as a school house under their direction. That at a much later period, a steeple and bell were added to the building; that the land was used as a church yard; that a sexton appointed by Lutherans had the direction of it; that more than half of the lot is covered with graves; and others as well as Lutherans have been buried there; that the Lutherans have caused the lot to be enclosed from time to time, as the fences fell into decay, and procured subscriptions for that purpose; that the possession of the Lutherans, in the manner in which it was exercised over the lot, by erecting a house, by public worship, by enclosing the ground, and by burials, was never questioned by Charles Beatty in his life time, or in any manner disturbed until a short period before the commencement of the present suit. That Charles Beatty in his life time constantly avowed that the lot was appropriated for the Lutherans, and that they were entitled to it.

The Lutherans have constituted but a small number in the town of Georgetown; they have not been able, therefore, to maintain public worship constantly in the house so erected, during the whole period; and sometimes it has been intermitted for a considerable length of time. But efforts have been constantly made, as far as practicable, to keep together a congregation, to use the means of divine worship, and to support public preaching. The house, however, in consequence of inevitable decay, fell down some time ago; the exact period of which, however, does not appear; but it seems to have been more than forty years after its first erection. Efforts have since been made to rebuild it, but hitherto they have not been successful.

The Lutherans in Georgetown, who have possessed the lot in question, are not and never have been incorporated as a religious society. The congregation has consisted of a voluntary society, acting in its general arrangement by committees and trustees, chosen from time to time by the Lutherans belonging to it. There do not appear to have been

any formal records kept of their proceedings; and there have been periods of considerable intermission in their appointment and action. There is no other proof that the plaintiffs are a committee of the congregation, than what arises from the statement of witnesses, that they were so chosen by a meeting of Lutherans, and that their appointment has always been acquiesced in by the Lutherans, and they have assumed to act for them without any question of their authority; that they are themselves Lutherans, living in Georgetown, and forming a part of the voluntary society, is not disputed.

There is decisive evidence also that the defendant Beatty has, since the decease of his father, repeatedly admitted the claim of the Lutherans to the lot, and his willingness that it should remain for them, as it had been originally appropriated. No assertion of ownership was ever made by him, until the acts were committed, which form the gravamen of the present bill.

Such are the material facts; and the principal questions arising upon this posture of the case, are, first, whether the title to the lot in question ever passed from Charles Beatty, so far at least as to amount to a perpetal appropriation of it to the use of the Lutheran church, or to the pious uses to which it has been in fact appropriated. And secondly, if so, whether it is competent for the plaintiffs to maintain the present bill.

As to the first question, it is not disputed that Charles Beatty did originally intend that this lot should be appropriated for the use of a Lutheran church in the town laid off by him. But as there was not at that time any church, either corporate or unincorporated, of that denomination in that town, there was no grantee capable of taking the same, immediately by grant. Nor can any presumption of a grant arise from the subsequent lapse of time, since there never has been any such incorporated Lutheran church there capable of taking the donation. If, therefore, it were necessary that there should be a grantee legally capable of taking, in order to support the donation in this case; it would be utterly void at law, and the land might be resumed at plea-

sure. To be sure, if an unincorporated society of Lutherans had, upon the faith of such donation, built a church thereon, with the consent of Beatty, that might furnish a strong ground why a court of equity should compel him to convey the same to trustees in perpetuity for their use; or at least to execute a declaration of trust, that he and his heirs should hold the same for their use. For such conduct would amount to a contract with the persons so building the church, that he would perfect the donation in their favour; and a refusal to do it would be a fraud upon them, which a court of equity ought to redress. And if the town of Georgetown had been capable of holding such a lot for such uses, there would be no difficulty in considering the town as the grantee under such circumstances; since the uses would be of a public and pious nature, beneficial to the inhabitants generally. But it does not appear that Georgetown, in 1769, or indeed until its incorporation in 1789, was a corporation, so as to be capable of holding lands as an incident to its corporate powers.

If the appropriation, therefore, is to be deemed valid at all, it must be upon other principles than those which ordinarily apply between grantor and grantee. And we think it may be supported as a dedication of the lot to public and pious uses. The bill of rights of Maryland gives validity to "any sale, gift, lease or devise of any quantity of land, not exceeding two acres, for a church, meeting or other house of worship, and for a burying ground, which shall be improved, enjoyed or used only for such purpose." To this extent, at least, it recognizes the doctrines of the statute of Elizabeth for charitable uses, under which it is well known, that such leases would be upheld, although there were no specific grantee or trustee. In the case of The Town of Pawlet *vs.* Clarke, 9 *Cranch*, 292. 331, this Court considered cases of an appropriation or dedication of property to particular or religious uses, as an exception to the general rule requiring a particular grantee; and like the dedication of a highway to the public(*a*). There

(*a*) See also Brown *vs.* Porter, 10 *Mass. Rep.* 93; Weston *vs.* Hunt, 2 *Mass.*

is no pretence to say, that the present appropriation was ever attempted to be withdrawn by Charles Beatty during his life time, and he did not die until about sixteen years ago. On the contrary, the original plan and appropriation were constantly kept in view by all the legislative acts passed on the subject of this addition. The plan was required to be recorded as an evidence of title, and its incorporation into the limits of Georgetown had reference to it. We think then it might at all times have been enforced as a charitable and pious use, through the intervention of the government as parens patriæ, by its attorney general or other law officer. It was originally consecrated for a religious purpose; it has become a depository of the dead; and it cannot now be resumed by the heirs of Charles Beatty.

The next question is as to the competency of the plaintiffs to maintain the present suit. If they were proved to be the regularly appointed committee of a voluntary society of Lutherans, in actual possession of the premises, and acting by their direction to prevent a disturbance of that possession, under circumstances like those stated in the bill, we do not perceive any serious objection to their right to maintain the suit. It is a case, where no action at law, even if one could be brought by the voluntary society, (which it would be difficult to maintain,) would afford an adequate and complete remedy. This is not the case of a mere private trespass; but a public nuisance, going to the irreparable injury of the Georgetown congregation of Lutherans. The property consecrated to their use by a perpetual servitude or easement, is to be taken from them; the sepulchres of the dead are to be violated; the feelings of religion, and the sentiment of natural affection of the kindred and friends of the deceased are to be wounded; and the memorials erected by piety or love, to the memory of the good, are to be removed so as to leave no trace of the last home of their ancestry to those who may visit the spot in future generations. It cannot be that such acts are to be

Rep. 500; Inhabitants of Shapleigh *vs* Gilman, 13 *Mass. Rep.* 190; Burrard's case, 12 *Jac. C. P.* 2 *Mod. Ent.* 413. *b.*

redressed by the ordinary process of law. The remedy must be sought, if at all, in the protecting power of a court of chancery; operating by its injunction to preserve the repose of the ashes of the dead, and the religious sensibilities of the living.

The only difficulty is whether the plaintiffs have shown in themselves a sufficient authority, since it is not evidenced by any formal vote or writing. If it were necessary, to decide the case on this point, we should incline to think that under all the circumstances it might be fairly presumed. But it is not necessary to decide the case on this point; because, we think it one of those cases, in which certain persons, belonging to a voluntary society, and having a common interest, may sue in behalf of themselves and others having the like interest, as part of the same society; for purposes common to all, and beneficial to all. Thus, some of the parishioners may sue a parson to establish a general modus, without joining all; and some of the members of a voluntary society or company, when the parties are very numerous, may sue for an account against others, without joining all(*a*).

And upon the whole we are of opinion, that the decree of the circuit court ought to be affirmed with costs.(*b*)

This cause came on to be heard on the transcript of the record from the circuit court of the United States, for the district of Columbia, holden in and for the county of Washington, and was argued by counsel; on consideration whereof, it is considered, ordered and decreed by this Court that the decree of the said circuit court in this cause be, and the same is hereby affirmed with costs.

(*a*) *Cooper's Eq. Plead.* 40, 41; *Mitf. Plead.* 145.

(*b*) If a layman, by the dissolution of monasteries, hath a monastery in which there is a church, part of it, and he suffers the parishioners for a long time to come there to hear divine service, and to use it as a parish church; that shall give a jurisdiction to the ordinary to order the seats; because that now, in fact, it becomes the parish church, which before was not subject to the ordinary: adjudged 12 *Ja. C. B.*; Buzzard's case, 2 *Mod. E.* 413. 6.